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No. 90-766

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In The

Supreme Court of the United States

October Term, 1990

GEORGE A. GUESS, M.D.,

Petitioner,

v.

NORTH CAROLINA BOARD
OF MEDICAL EXAMINERS,

Respondent.

**Petition For Writ Of Certiorari To
The Supreme Court Of North Carolina**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was the conditional revocation by the Board of Medical Examiners of Petitioner's license to practice medicine for his failure to conform to the standards of acceptable and prevailing medical practice a proper and constitutional exercise of the State's police power?

II. Is N.C. Gen. Stat. § 90-14(a)(6) (1985) unconstitutionally vague as interpreted by the North Carolina Supreme Court?

III. Does N.C. Gen. Stat. § 90-14(a)(6) (1985), as interpreted by the North Carolina Supreme Court, limiting Petitioner's methods of practice to those which conform to the standards of acceptable and prevailing medical practice, infringe on Petitioner's liberty or privacy rights?

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GEORGE A. GUESS, M.D.,

Petitioner,

v.

NORTH CAROLINA BOARD OF MEDICAL EXAMINERS,

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Petition For Writ Of Certiorari To The Supreme Court Of North Carolina

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Board of Medical Examiners of the State of North Carolina ("Board"),[1] respectfully submits that a writ of certiorari to review the judgment and opinion of the North Carolina Supreme Court in *In Re Guess, M.D.*, 327 N.C. 46, 393 S.E.2d 833 (1990), is unnecessary and should not issue.

[1] The correct name of Respondent is "Board of Medical Examiners of the State of North Carolina", not "North Carolina Board of Medical Examiners" as Petitioner indicates.

The North Carolina Supreme Court affirmed the decision of the Board which limited Petitioner's practice of medicine to the statutory standard of "acceptable and prevailing medical practice." Contrary to Petitioner's assertion, the Board's conditional revocation of his license was not "solely because he was the only doctor in North Carolina using homeopathic drugs." (Petition, p. 1). Rather, the Board's decision was based on its obligation to enforce the statutory requirement that its licensees practice in accordance with the standards of acceptable and prevailing medical practice.

The Petitioner misstates the holding of the North Carolina Supreme Court. (Petition, p. 2). The North Carolina Supreme Court held that N.C. Gen. Stat. § 90-14(a)(6) is a valid exercise of the State's police power and that the statute requires no specific showing of harm. The State Supreme Court also held that the statute is sufficiently specific to give guidance to the Board to determine whether a licensee's practice is within the "standards of acceptable and prevailing medical practice." In reaching its conclusion, the State Supreme Court noted that evidence as to the efficacy of homeopathic drugs was not relevant to the issue before the Court "in light of the uncontroverted evidence and the Board's findings and conclusions that homeopathy is not currently an 'acceptable and prevailing system of medical practice in North Carolina.'" (App. pp. 12-13). The State Supreme Court noted that the legislature and not the courts would be the proper forum for any debate as to the efficacy of homeopathy and whether its practice should be allowed in North Carolina.

OPINIONS BELOW[2]

Proceedings below were as follows:

1. *In re Guess, M.D.*, 327 N.C. 46, 393 S.E.2d 833 (1990) (affirming Board's Order and reversing Court of Appeals);

2. *In re Guess, M.D.*, 95 N.C. App. 435, 382 S.E.2d 459 (1989) (affirming Superior Court decision on different grounds and imposing an additional requirement in the statute of a showing of harm);

3. *In re Guess, M.D.*, 324 N.C. 105, 376 S.E.2d 8 (1989) (holding that Court of Appeals had jurisdiction to consider appeal);

4. *In re Guess, M.D.*, 89 N.C. App. 711, 367 S.E.2d 11 (1988) (dismissing appeal for lack of jurisdiction);

5. *In re Guess, M.D.*, No. 89CVS510 (Superior Court, Wake County, North Carolina, May 20, 1987) (reversing Board's Order on basis that Order not supported by evidence);

6. Findings of Fact, Conclusions of Law and Order of the Board of Medical Examiners of the State of North Carolina, January 14, 1986. (revoking Petitioner's license but staying revocation on condition that he refrain from use of homeopathic medicines in his practice of medicine).

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[2] Pursuant to Rule 24.2, Supreme Court Rules, the Statement of Jurisdiction and the Statement of Constitutional and Statutory Provisions involved are omitted.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

This matter began on June 25, 1985 as a professional disciplinary action initiated by the Board with the issuance of a Notice of Charges and Allegations against Petitioner. The Board charged that Petitioner had engaged in "unprofessional conduct" in that his prescribing of homeopathic medicines in the course of his medical practice "departs from and does not conform to the standards of acceptable and prevailing medical practice in the state of North Carolina." N.C. Gen. Stat. § 90-14(a)(6) (1985).

At the properly noticed hearing held before the Board in October and December 1985, evidence established that Petitioner was the only licensee of the Board known to be employing homeopathic medicines in his practice in North Carolina. Following the hearing, the Board ordered that Petitioner's license be revoked, with the revocation stayed on the condition that he refrain from the use of homeopathic medicines in his medical practice in North Carolina. The Board specifically found:

> 9. Respondent is the only licensee of the Board known to the Board who utilizes, in the course of diagnosing or attempting to diagnose, treating, or attempting to treat, prescribing for or administering to, or professing to treat human ailments, diseases, and the like, certain preparations known generally as "homeopathic medicines."
>
> . . .
>
> 12. While a few other states have statutory schemes for the regulation of the practice of so-called "homeopathic medicine," no such statutory procedures exist in North Carolina.

> 13. The utilization by Respondent in his practice of medicine of certain preparations known generally as "homeopathic medicines" departs from and does not conform to the standards of acceptable and prevailing practice in this State.

Findings of Fact, Conclusions of Law and Order of the Board of Medical Examiners of the State of North Carolina, January 14, 1986. (App. pp. 27-28). Based, *inter alia*, on these Findings of Fact, the Board concluded that Petitioner's utilization of homeopathic medicines in his practice of medicine constituted unprofessional conduct within the meaning of N.C. Gen. Stat. § 90-14(a)(6).

Petitioner appealed from the Board's Order to the Superior Court of Wake County, North Carolina. The Superior Court reversed the Board on the basis that the Board's Findings of Fact were not supported by the evidence. The Board appealed to the North Carolina Court of Appeals.[3] Although the Court of Appeals ultimately affirmed the Superior Court's decision, it specifically disagreed with the lower court's basis for reversal of the Board. The Court of Appeals stated:

> The Superior Court's findings and conclusions as to the Board's findings of fact have no basis, as the Board's principle [sic] findings of fact are not only supported by competent evidence, they are essentially undisputed.

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[3] The North Carolina Court of Appeals initially declined to review the matter because of jurisdictional concerns. *In re Guess, M.D.*, 89 N.C. App. 711, 367 S.E.2d 11 (1988). The North Carolina Supreme Court vacated the Court of Appeals' decision and ruled that jurisdiction was proper in the Court of Appeals. *In re Guess, M.D.*, 324 N.C. 105, 376 S.E.2d 8 (1989).

(App. p. 23). Having so said, however, the Court of Appeals affirmed the result reached by the Superior Court, finding an implicit requirement in the statute that "the nonconforming practices endanger or harm the public in some way," because, according to the court, "in our opinion the revocation of a physician's license to practice his profession in this state must be based upon conduct that is detrimental to the public." (App. p. 24).

The Board's petition for discretionary review to the North Carolina Supreme Court was granted and the Supreme Court reversed the Court of Appeals and affirmed the Board's Order. The North Carolina Supreme Court held that N.C. Gen. Stat. § 90-14(a)(6) was a valid exercise of the police power and that there is no requirement that "every action taken by the Board specifically identify or address a particular injury or danger to any individual or to the public." (App. p. 10).

FACTUAL BACKGROUND

The Board of Medical Examiners is authorized by N.C. Gen. Stat. § 90-14 to suspend or revoke a license issued by it to any person who has been found by the Board to have committed any one of certain specifically enumerated acts. Among those enumerated acts is the following:

> (6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby. . . .

N.C. Gen. Stat. § 90-14(a)(6) (1985).

The evidence in the record before the state appellate courts showed that the use of homeopathic medicines was not an acceptable and prevailing system of medical practice in North Carolina. The evidence indicated that Petitioner was the only licensee of the Board utilizing homeopathic medicines in North Carolina. The Court of Appeals stated that the Board's Findings of Fact were not only supported by competent evidence in the record, but also, that they were "essentially undisputed." (App. p. 23). The Supreme Court stated, "The facts of this case are essentially uncontested." (App. p. 2). Based on the undisputed, uncontested evidence, the Board was obligated by statute to conclude that Petitioner's use of homeopathic medicines in his practice of medicine did not conform to "the standards of acceptable and prevailing medical practice" in the State.

SUMMARY OF ARGUMENT

The regulation by the Board of medical practitioners in North Carolina by requiring that they comply with the statutory prohibition against "unprofessional conduct," which includes engaging in practices which fail to "conform to the standards of acceptable and prevailing medical practice," is a reasonable and appropriate exercise of the State's police power. The regulation of medical practice is clearly within the scope of the State's police power and the means chosen by the legislature and incorporated in N.C. Gen. Stat. § 90-14(a)(6) are reasonable.

N.C. Gen. Stat. § 90-14(a)(6) is sufficiently specific to give notice to the "reasonably intelligent practitioner" of

the types of forbidden conduct. In the present case, the Petitioner knew his practice of homeopathic medicine was not within the "standards of acceptable and prevailing medical practice" in North Carolina. Therefore, Petitioner's argument that the statute is vague or overbroad is misplaced.

The Petitioner's right to practice medicine is subject to the State's police power. By limiting Petitioner's choice of treatments to those treatments which conform to the acceptable and prevailing standards of medical practice in the State, the State has not infringed on any of Petitioner's protected rights.

ARGUMENT

I. N.C. GEN. STAT. § 90-14(a)(6) IS A VALID EXERCISE OF THE STATE'S POLICE POWER AND THE BOARD'S APPLICATION OF THE STATUTE IN REVOKING PETITIONER'S LICENSE WAS APPROPRIATE.

A State's police power is an essential attribute of sovereignty and, although precise definitions of police power are difficult, if not impossible, it is clearly "the power to protect the public health and the public safety . . . to protect the lives and property of the citizens . . . by any legislation appropriate to that end." *Skinner v. Thomas*, 171 N.C. 98 (1916), citing, 9 Ency. of U.S. Reports 473; *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

The expansive scope of the State's police power has long been recognized, as has the concept that exercise of

the power should be left to the discretion of the legislature. *Berman v. Parker, supra.* Thus, the General Assembly of North Carolina has authority and broad discretion to legislate for the protection of the public health, safety, and general welfare of the people of North Carolina. Further, a State's police power is particularly broad in the regulation of medical practice and administration of drugs within its borders. *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) ("It is of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions." (citations omitted) 429 U.S. at 603, n. 30). As the Court stated in *Barsky v. Board of Regents,* 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829 (1953):

> It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health.

347 U.S. at 449.

If a statute by which the State exercises its police power is challenged, courts will uphold the challenged statute if the subject matter sought to be regulated is within the scope of the police power and the means employed are reasonable. *Goldblatt v. Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (" 'debatable questions as to reasonableness are not for the courts but for the legislature. . . . ' " (citation omitted) 369 U.S. at 595). In assessing the reasonableness of legislation, a court may not substitute its judgment for that of the legislative

body. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

As the United States Supreme Court has long recognized, regulation of the medical profession is clearly within the scope of the State's police power. *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889). The *Dent* Court, in upholding the validity of regulations regarding the licensure of physicians noted:

> The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations *as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.* (emphasis added).

129 U.S. at 122.

Apparently, Petitioner's challenge to the disciplinary action taken against him by the Board is based on the grounds articulated by the North Carolina Court of Appeals, that is, that the statute implicitly requires a showing of specific harm prior to a finding that a nonconforming practice is "unprofessional conduct" within the meaning of the statute. However, such a challenge must fail in light of the clear language of the statute and its expression of the reasonable legislative intent.

Obviously, by including in the statute the language, "irrespective of whether or not a patient is injured thereby," the North Carolina General Assembly chose to make the existence of a specific harm irrelevant to the inquiry. The legislature reasonably believed that unprofessional conduct, for which the Board would be authorized to suspend or revoke a license, should include "*any* departure from, . . . the standards of acceptable and

prevailing medical practice, . . . *irrespective of whether or not a patient is injured thereby*. . . . " N.C. Gen. Stat. § 90-14(a)(6). The legislature's determination that specific injury was not required is a determination within the legislature's discretion.

The North Carolina Supreme Court concluded that N.C. Gen. Stat. § 90-14(a)(6) was a valid exercise of the State's police power because the statute addressed what the legislature might reasonably perceive as a "general risk of endangering the public [which] is *inherent* in *any* practices which fail to conform to the standards of 'acceptable and prevailing' medical practice in North Carolina." (App. p. 8). Thus, the State Court reasoned, in the language of *Dent*, that the statute "tend[s] to secure" the public against "the consequences of ignorance and incapacity as well as of deception and fraud," even though it may not immediately have that direct effect in a particular case. (App. p. 8).

In addition to the reasons articulated by the North Carolina Supreme Court, the statute and the Board's disciplinary action thereunder against Petitioner should be upheld as a proper exercise of the police power because, in the absence of any regulatory body for homeopathic medicine in North Carolina, if the Petitioner is allowed to practice homeopathic medicine in North Carolina, his homeopathic practice would be entirely unregulated. The existence of such an unregulated practice would pose a clear danger to the public health and welfare. Unlike the few states which Petitioner identified as having licensing agencies for homeopathic physicians, North Carolina

does not have any means for the regulation or supervision of an individual engaged in the practice of homeopathic medicine. Thus, even if the statute were to be interpreted as requiring some risk of endangerment to the public, that risk exists both in the general risk identified by the Supreme Court and in the further specific risk resulting from unregulated practice.

Petitioner complains that the Board and the North Carolina Supreme Court rejected as irrelevant his evidence and contentions that homeopathic medicines are used and considered efficacious in a few other states in this country and in several foreign countries. (Petition, p. 12.) However, in its regulation of the practice of medicine in North Carolina, the Board is required to apply a *statewide* standard of practice. *See, Dailey v. North Carolina Board of Dental Examiners*, 309 N.C. 710, 309 S.E.2d 219 (1983). The only physicians the Board is empowered to regulate are those whom it licenses for the practice of medicine in North Carolina. Thus, it clearly is not relevant to this inquiry whether some doctors in Connecticut or Nevada or Mexico or Pakistan are practitioners of and believers in homeopathy. *All* of the physicians who testified at Petitioner's hearing before the Board and who were licensed to practice in North Carolina – including those called as witnesses by Petitioner – agreed that the use of homeopathic medicines was not an "acceptable and prevailing medical practice in North Carolina." Under the required statewide standard, Petitioner's use of homeopathic medicines was overwhelmingly shown to be improper.

Consequently, the conditional revocation by the Board of Petitioner's license for his failure to conform to

the standards of acceptable and prevailing medical practice in North Carolina was a proper and constitutional exercise of the State's police power.

II. N.C. GEN. STAT. § 90-14(a)(6) AS INTERPRETED BY THE NORTH CAROLINA SUPREME COURT IS NOT UNCONSTITUTIONALLY VAGUE.

The Petitioner apparently contends that because of alleged vagueness of N.C. Gen. Stat. § 90-14(a)(6) a practitioner would not be able "to predict when a practice is prevailing" and, thus, would not know when he was engaging in unprofessional conduct. (Petition, p. 15).[4] Petitioner's contention is disingenuous. He complains that the Board ignored and the North Carolina Supreme Court rejected as irrelevant his evidence that homeopathy is a "widely accepted method of medical treatment" approved by "many regulatory professional bodies, including a nationwide professional association and three separate state licensing boards." (Petition, p. 15.) If homeopathy is so "widely accepted," why was Petitioner not able to produce a single witness to attest to its use and acceptance in the medical profession in North Carolina? Moreover, it is obvious that some "nationwide professional association" and licensing boards in three other states have neither the authority to regulate medical practice in North Carolina nor any knowledge of the level of acceptance and use of homeopathic medicines in the

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[4] Petitioner argues that the North Carolina Supreme Court's "interpretation" of the statute is vague. Presumably, the Petitioner means that the statute itself is vague as interpreted by the Court. *See* Petition, p. 16.

medical profession in North Carolina. Accordingly, if there is any relevance to this "evidence" offered by Petitioner, it is to show that it is not reasonable for him to contend that he could not know that under N.C. Gen. Stat. § 90-14(a)(6) his conduct was outside the bounds of acceptable and prevailing medical practice in North Carolina. The statute provides adequate notice to practitioners of the types of conduct which would constitute unprofessional conduct and gives adequate guidance to the Board.

In the case of *United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975), the Supreme Court noted that, "straining to inject doubt as to meaning of words where no doubt could be felt by the normal reader is not required by the 'void for vagueness' doctrine, and we will not indulge in it." 423 U.S. at 93. Additionally, in the case of *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), the Court stated:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing . . . statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

407 U.S. at 110.

The predecessor statute to N.C. Gen. Stat. § 90-14(a)(6) authorized the Board of Medical Examiners to revoke an individual's license to practice medicine if the licensee "had been guilty of any unprofessional or

dishonorable conduct unworthy of and affecting the practice of his profession." N.C. Gen. Stat. § 90-14 (superseded). This predecessor statute was upheld by the North Carolina Supreme Court against a challenge that the statutory language was vague and overbroad. *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978), criticized on other grounds by *In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). In the *Wilkins* case, the State Supreme Court noted that the issues involved were not related to any of the freedoms protected by the First Amendment to the Constitution of the United States and, thus, the "vagueness" challenge to the statute was "not to be weighed . . . in the delicate scales required to be used in cases where First Amendment freedoms are at stake." *In re Wilkins*, 294 N.C. at 547, citing *United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975); *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).

In concluding that the statute sufficiently defined "unprofessional conduct" and provided practitioners with adequate notice, the *Wilkins* Court stated:

> It would obviously be futile to attempt to catalog in a statute, or in an order of the Board conditionally revoking the license of a practitioner, every conceivable improper practice in which the licensee is forbidden to engage. Neither the Federal nor the State Constitution requires such a tedious exercise in futility in order to save a disciplinary statute, or order, from attack on the ground of vagueness and over-breadth. In the application of such statute or order to subsequent medical practices by a licensee, not involving his First Amendment freedoms, *the facts of the case at hand must determine the decision of the courts as to vagueness and over-breadth. United States v. Mazurie, supra. The*

> *test is whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden.* (emphasis added).

294 N.C. at 548. Applying the test articulated by the *Wilkins* Court, the North Carolina Supreme Court in the present case concluded that "any reasonably intelligent licensed physician will know when he is engaging in a practice which does not conform to the 'standards of acceptable and prevailing medical practice' in North Carolina." (App. p. 14).

Particularly when N.C. Gen. Stat. § 90-14(a)(6) is "examined in light of the facts of the case at hand," (*United Sates v. Mazurie*, 419 U.S. at 550), is it apparent that the statutory language is sufficiently specific. Not only did several physicians testify before the Board that the use of homeopathic medicines did not conform to the standards of acceptable and prevailing medical practice in North Carolina, but also, Petitioner, himself, presented evidence that the use of homeopathic medicines was not common in North Carolina. Thus, on the facts of this case, Petitioner clearly understood that the use of homeopathic medicines was not within the "standards of acceptable and prevailing medical practice" in North Carolina.

In the case of *In re Hawkins*, 17 N.C. App. 378, 194 S.E.2d 540, *cert. denied*, 283 N.C. 393, 196 S.E.2d 275, *cert. denied*, 414 U.S. 1001 (1973), respondent dentists challenged as unconstitutionally vague a North Carolina statute permitting revocation of a dental license for "unprofessional conduct." The Court of Appeals upheld the statute, stating, "the determination whether by common judgment certain conduct is disqualifying is left to the sound discretion of the Board." 17 N.C. App. at 395,

citing, *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447, 436 P.2d 828 (1968). Similarly, the determination that Petitioner's conduct constitutes unprofessional conduct is a matter within the sound discretion of the Board.

In the case cited by the Petitioner, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), a First Amendment case, the statute at issue was upheld because the Court found that the challenged ordinance was sufficiently clear as to the conduct prohibited. The Court noted that:

> Here, we are "relegated to the words of the ordinance itself," to the interpretations the court below has given to an analogous statute and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it. "Extrapolation," of course, is a delicate task, for it is not within our power to construe and narrow state laws. (citations omitted).

408 U.S. at 110. Similarly, in the present case, the courts below, being "relegated" to the clear language of N.C. Gen. Stat. § 90-14(a)(6) and the interpretation North Carolina courts have given its predecessor statute, upheld the statute against Petitioner's claim of vagueness. Contrary to the assertion of Petitioner that he and other licensees are "at the mercy of the Medical Board to decide on an *ad hoc* and subjective basis whether a practice is prevailing" (Petition, p. 16), it is clear under North Carolina law that the Board must prove by independent evidence in the record the violation by a licensee of a statewide standard of practice. *Dailey v. North Carolina Board of Dental Examiners, supra*. Here, that is exactly what has been done via the testimony at the hearing before the Board of physicians who were licensed to practice in North Carolina

and who were unanimous that the use of homeopathic medicines was *not* a prevailing practice in North Carolina. There was nothing *ad hoc* or subjective about the findings and conclusions of the Board that Petitioner had engaged in unprofessional conduct. While Petitioner may not like the result in this case, that does not make the challenged statute impermissibly vague.

III. LIMITING PETITIONER'S METHODS OF MEDICAL PRACTICE TO THOSE METHODS WHICH CONFORM TO THE STANDARDS OF ACCEPTABLE AND PREVAILING MEDICAL PRACTICE DOES NOT INFRINGE ON HIS PROTECTED LIBERTY OR PRIVACY RIGHTS.

Based on Petitioner's analysis of the Court's opinion in *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), Petitioner contends that N.C. Gen. Stat. § 90-14(a)(6) infringes on his right to practice his profession. In the *Doe* case, the physician appellants argued that the Georgia abortion statute requiring that an individual physician's decision to perform an abortion must be reviewed by a hospital committee and must be confirmed by two consulting physicians "impermissibly restricted his right to practice his profession." 410 U.S. at 193. In striking down the provisions of the Georgia statute requiring confirmation by two consulting physicians, the Court stressed that its reasoning was based on the fact that the Georgia statute's emphasis was on the physician's "best clinical judgment" and that that judgment should be sufficient.

The *Doe* Court reasoned:

> If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. . . . It is still true today that "[r]eliance must be placed upon the assurance given by his license, issued by an authority to judge in that respect, that [the physician] possesses the requisite qualifications." *Dent v. West Virginia*, 129 U.S. 114, 122-123, 32 L.Ed. 623, 9 S.Ct. 231 (1889).

410 U.S. at 199-200. Obviously, the United States Supreme Court recognized the importance of a state licensing authority in controlling the "acceptable clinical judgment" of physicians. Similarly, the North Carolina statute gives the Board of Medical Examiners authority to sanction a physician for failure to conform to acceptable and prevailing standards of practice.

As the North Carolina Supreme Court recognized in the present case, any privacy or liberty right Petitioner might have to select a method of practice remains subject to the police power of the State. As the State Supreme Court noted:

> Regarding Guess's ability to select his method of practice, "there is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowsley*, 272 U.S. 581, 596, 71 L.Ed. 422, 429 (1926) (citing cases).

(App. p. 14). Petitioner's argument that because a person can refuse life sustaining medical treatment, he, therefore, has a constitutional liberty to choose a course of treatment and, further, that a doctor must then have the constitutional right to provide such treatment is simply

too attenuated. Furthermore, Petitioner lacks standing to raise the constitutional rights of patients or other third parties. *Warth v. Seldin*, 422 U.S. 90, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

Clearly, Petitioner has no unrestricted right to select medications or treatments for use in his medical practice. As the Iowa Supreme Court noted, "It does not follow, [from the right to accept or reject medical treatment generally] however, that there is a fundamental right to select a particular treatment or medication." *Iowa Dept. of Health v. Van Wyk*, 320 N.W.2d 599, 606 (Iowa, 1982). The Court of Appeals for the Tenth Circuit in the case of *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980), stated:

> It is apparent in the context with which we are here concerned that the decision whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health.

616 F.2d at 457. At issue in *Rutherford* was whether the Food, Drug, and Cosmetic Act requirements should permit an exemption for the interstate shipment for sale of the drug laetrile to be used in the treatment of the terminally ill.

Additionally, as the North Carolina Supreme Court stated, "we have recognized no fundamental right to receive unorthodox medical treatment, and we decline to do so now. *See State v. Howard*, 78 N.C. App. 262, 269, 337 S.E.2d 598, 603 (1985), *disc. rev. denied, appeal dismissed*, 316 N.C. 198, 341 S.E.2d 581 (1986)." (App. p. 15). Because Petitioner's right to choose any particular method of treatment to provide for his patients is limited by the

State's police power, there is no impermissible infringement on Petitioner's rights. As interpreted by the North Carolina Supreme Court, N.C. Gen. Stat. § 90-14(a)(6) does not deprive Petitioner of any right to practice his profession; rather, it simply reasonably limits the choice of treatments which he may offer patients to those treatments which conform to the acceptable and prevailing standards of medical practice in North Carolina.

CONCLUSION

The conditional revocation of Petitioner's license for his failure to conform to the standards of acceptable and prevailing medical practice clearly was a proper and constitutional exercise of the State's police power. As interpreted by the North Carolina Supreme Court, N.C. Gen. Stat. § 90-14(a)(6) is neither unconstitutionally vague nor an infringement on Petitioner's liberty or privacy rights. For these reasons, the petition for a writ of certiorari should be denied.

This the 12th day of December, 1990.

/s/ Michael E. Weddington
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APPENDIX A

IN THE SUPREME COURT

IN RE GUESS

[327 N.C. 46 (1990)]

IN RE: GEORGE A. GUESS, M.D., RESPONDENT

No. 431PA89

(Filed 26 July 1990)

Justice FRYE dissenting.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 95 N.C. App. 435, 382 S.E.2d 459 (1989), affirming an order entered by *Farmer, J.*, on 20 May 1987 in Superior Court, WAKE County. Heard in the Supreme Court on 11 April 1990.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Susan M. Parker, for the complainant appellant Board of Medical Examiners of the State of North Carolina.

Manning, Fulton & Skinner, by Charles E. Nichols, Jr., for the respondent appellee George A. Guess, M.D.

MITCHELL, Justice.

At issue in this case is whether the Court of Appeals erred in affirming a Superior Court order which reversed and vacated a decision of the Board of Medical Examiners of the State of North Carolina conditionally revoking the respondent appellee's medical license. We conclude that the Court of Appeals did err in this regard, and we reverse its holding.

The facts of this case are essentially uncontested. The record evidence tends to show that Dr. George Albert Guess is a licensed physician practicing family medicine in Asheville. In his practice, Guess regularly administers homeopathic medical treatments to his patients. Homeopathy has been defined as:

> A system of therapy developed by Samuel Hahnermann on the theory that large doses of a certain drug given to a healthy person will produce certain conditions which, when occurring spontaneously as symptoms of a disease, are relieved by the same drug in small doses. This [is] . . . a sort of "fighting fire with fire" therapy.

Stedman's Medical Dictionary 654 (24th ed. 1982); *see* Schmidt's Attorneys' Dictionary of Medicine H-110 (1962). Homeopathy thus differs from what is referred to as the conventional or allopathic system of medical treatment. Allopathy "employ[s] remedies which affect the body in a way *opposite* from the effect of the disease treated." Schmidt's Attorneys' Dictionary of Medicine A-147 (emphasis added); *see* Stedman's Medical Dictionary 44.

The Board of Medical Examiners of the State of North Carolina (herein Board) is a legislatively created body established "to properly regulate the practice of medicine and surgery." N.C.G.S. § 90-2 (1985). On 25 June 1985, the Board charged Dr. Guess with unprofessional conduct, pursuant to N.C.G.S. § 90-14(a)(6), specifically based upon his practice of homeopathy. In a subsequent Bill of Particulars, the Board alleged that in his practice of medicine, Guess utilized "so-called 'homeopathic medicines' prepared from substances including, but not limited to, moss, the night shade plant and various other animal,

vegetable and mineral substances." The Board further alleged that the use of homeopathic medicines "departs from and does not conform to the standards of acceptable and prevailing medical practice in the State of North Carolina." *See* N.C.G.S. § 90-14(a)(6) (1985).

Following notice, a hearing was held by the Board on the charge against Dr. Guess. The hearing evidence chiefly consisted of testimony by a number of physicians. Several physicians licensed to practice in North Carolina testified that homeopathy was not an acceptable and prevailing system of medical practice in North Carolina. In fact, there was evidence indicating that Guess is the only homeopath openly practicing in the State. Guess presented evidence that homeopathy is a recognized system of practice in at least three other states and many foreign countries. There was no evidence that Guess' homeopathic treatment had ever harmed a patient, and there was anecdotal evidence that Guess' homeopathic remedies had provided relief to several patients who were apparently unable to obtain relief through allopathic medicine.

Following its hearing, the Board revoked Dr. Guess' license to practice medicine in North Carolina, based upon findings and conclusions that Guess' practice of homeopathy "departs from and does not conform to the standards of acceptable and prevailing medical practice in this State," thus constituting unprofessional conduct as defined and prohibited by N.C.G.S. § 90-14(a)(6). The Board, however, stayed the revocation of Guess' license for so long as he refrained from practicing homeopathy.

Guess appealed the Board's decision to the Superior Court, Wake County, pursuant to N.C.G.S. § 90-14.8. On 17 January 1986, the Superior Court stayed the Board's decision pending judicial review. After review, the Superior Court entered an order on 20 May 1987 which reversed and vacated the Board's decision. The Superior Court found and concluded that Guess' substantial rights had been violated because the Board's findings, conclusions and decision were "not supported by competent, material and substantial evidence and [were] arbitrary and capricious."

The Board appealed the Superior Court's order to the Court of Appeals, which dismissed the appeal for lack of jurisdiction. *In re Guess*, 89 N.C. App. 711, 367 S.E.2d 11 (1988). This Court reversed that decision and remanded this case to the Court of Appeals for its determination of the issues raised by the appeal. *In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). On remand, the Court of Appeals rejected the Superior Court's reasoning to the effect that the Board's findings, conclusions and decision were not supported by competent evidence. *In re Guess*, 95 N.C. App. 435, 437, 382 S.E.2d 459, 461 (1989). The Court of Appeals, nonetheless, affirmed the Superior Court's order reversing the Board's decision,

> because the Board neither charged nor found that Dr. Guess' departures from approved and prevailing medical practice either endangered or harmed his patients or the public, and in our opinion the revocation of a physician's license to practice his profession in this state must be based upon conduct that is detrimental to the public; it cannot be based upon conduct that is merely different from that of other practitioners.

Id. at 437, 382 S.E.2d at 461. We granted the Board's Petition for Discretionary Review, and now reverse the Court of Appeals.

I.

The statute central to the resolution of this case provides in relevant part:

> § 90-14. Revocation, suspension, annulment or denial of license.
>
> (a) The Board shall have the power to deny, annul, suspend, or revoke a license . . . issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:
>
> . . . .
>
> (6) Unprofessional conduct, including, but not limited to, *any departure* from, or the failure to conform to, the *standards of acceptable and prevailing medical practice*, or the ethics of the medical profession, *irrespective of whether or not a patient is injured thereby*. . . .

N.C.G.S. § 90-14 (1985) (emphasis added). The Court of Appeals concluded that in exercising the police power, the legislature may properly act only to protect the public from harm. *In re Guess*, 95 N.C. App. at 437-38, 382 S.E.2d at 461. Therefore, the Court of Appeals reasoned that, in order to be a valid exercise of the police power, the statute must be construed as giving the Board authority to prohibit or punish the action of a physician only when it can be shown that *the particular action in question* poses a danger of harm to the patient or the public. *Id.* Specifically, the Court of Appeals held that:

> Before a physician's license to practice his profession in this state can be lawfully revoked under G.S. 90-14(a)(6) for practices contrary to acceptable and prevailing medical practice that *it must also appear that the deviation complained of posed some threat of harm to either the physician's patients or the public.*

Id. at 438, 382 S.E.2d at 462 (emphasis added).

The Board argues, and we agree, that the Court of Appeals erred in construing the statute to add a requirement that each particular practice prohibited by the statute must pose an actual threat of harm. Our analysis begins with a basic constitutional principle: the General Assembly, in exercising the state's police power, may legislate to protect the public health, safety and general welfare. *See, e.g., Treants Enterprises, Inc. v. Onslow County,* 320 N.C. 776, 360 S.E.2d 783 (1987); *Martin v. Housing Corp.,* 277 N.C. 29, 175 S.E.2d 665 (1970); *Shelby v. Power Co.,* 155 N.C. 196, 71 S.E. 218 (1911). When a statute is challenged as being beyond the scope of the police power, the statute will be upheld unless it has no rational relationship to such a legitimate public purpose. *See, e.g., In re Hospital,* 282 N.C. 542, 193 S.E.2d 729 (1973); *Surplus Stores, Inc. v. Hunter,* 257 N.C. 206, 125 S.E.2d 764 (1962); *Skinner v. Thomas,* 171 N.C. 98, 87 S.E. 976 (1916).

Turning to the subject of this case, regulation of the medical profession is plainly related to the legitimate public purpose of protecting the public health and safety. *See Board of Medical Examiners v. Gardner,* 201 N.C. 123, 127, 159 S.E. 8, 10 (1931). State regulation of the medical profession has long been recognized as a legitimate exercise of the police power. As the Supreme Court of the United States has pointed out:

> The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure *or tend to secure* them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely. . . . The nature and extent of the qualifications required must depend primarily upon the judgments of the States as to their necessity. . . .
>
> Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend. . . . The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possess the requisite qualifications. . . . The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected.

Dent v. West Virginia, 129 U.S. 114, 122-23, 32 L. Ed. 623, 626 (1889) (emphasis added); *see also, e.g., Barsky v. Board*

of Regents, 347 U.S. 442, 449, 98 L. Ed. 829, 838 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there.").

The provision of the statute in question here is reasonably related to the public health. We conclude that the legislature, in enacting N.C.G.S. § 90-14(a)(6), reasonably believed that a general risk of endangering the public is *inherent* in *any* practices which fail to conform to the standards of "acceptable and prevailing" medical practice in North Carolina. We further conclude that the legislative intent was to prohibit any practice departing from acceptable and prevailing medical standards without regard to whether the particular practice itself could be shown to endanger the public. Our conclusion is buttressed by the plain language of N.C.G.S. § 90-14(a)(6), which allows the Board to act against *any* departure from acceptable medical practice "irrespective of whether or not a patient is injured thereby." By authorizing the Board to prevent or punish *any* medical practice departing from acceptable and prevailing standards, irrespective of whether a patient is injured thereby, the statute works as a regulation which "tend[s] to secure" the public generally "against the consequences of ignorance and incapacity as well as of deception and fraud," even though it may not immediately have that direct effect in a particular case. *See Dent v. West Virginia*, 129 U.S. at 122, 32 L. Ed. at 626. Therefore, the statute is a valid exercise of the police power.

We next address a related question, whether the statute, N.C.G.S. § 90-14(a)(6), properly delegates authority to the Board. We have previously recognized that the

legislature may delegate certain authority, such as adjudicative and rule-making functions, to administrative bodies. *See Adams v. Dept. of N.E.R. and Everett v. Medical Examiners v. Gardner*, 201 N.C. 123, 159 S.E. 8. However, the legislature may not give unfettered discretion to the administrative body, but must instead provide "adequate guiding standards to govern the exercise of the delegated powers." *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.* 295 N.C. at 697, 249 S.E.2d at 410 (citing cases). Regarding this level of guidance which the legislature must provide to administrative bodies, we have held that:

> When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Id. at 698, 249 S.E.2d at 411.

Certain aspects of regulating the medical profession plainly require expertise beyond that of a layman. Our legislature recognized that need for expertise when it created a Board of Medical Examiners composed of seven licensed physicians and one additional member. N.C.G.S. § 90-2 (1985). Examining the language of N.C.G.S. § 90-14(a)(6), we conclude that the legislature clearly wished to protect the public from "unprofessional conduct" by physicians, and gave as an example of such conduct that which does not conform to the "standards of

acceptable and prevailing medical practice." The statutory phrase "standards of acceptable and prevailing medical practice" is sufficiently specific to provide the Board – comprised overwhelmingly of expert physicians – with the "adequate guiding standards" necessary to support the legislature's delegation of authority.

The statute in question is a valid regulation which generally tends to secure the public health, safety, and general welfare, and the legislature has permissibly delegated certain regulatory functions connected with that valid exercise of the police power to the Board. There is no requirement, however, that every action taken by the Board specifically identify or address a particular injury or danger to any individual or to the public. It is enough that the statute is a valid exercise of the police power for the public health and general welfare, so long as the Board's action is in compliance with the statute. The Court of Appeals thus erred in requiring a showing of potential harm from the particular practices engaged in by Dr. Guess as a prerequisite to Board action, and for that reason the Court of Appeals' decision is reversed.

II.

Having determined that N.C.G.S. § 90-14(a)(6) does not require that an unacceptable practice by a physician pose a particular threat of public harm before the Board may take action against that physician, we next consider whether the Board's action in this case was otherwise within its statutory authority. We first must decide whether the Board's decision in this case was supported by "competent, material, and substantial evidence."

N.C.G.S. § 90-14.10 (1985). Judicial review of a decision by the Board of Medical Examiners is made according to what is frequently referred to as the "any competent evidence" standard. *See In re Rodgers*, 297 N.C. 48, 64 n.4, 253 S.E.2d 912, 922 n.4 (1979). The Superior Court found that the Board's decision was not supported by "competent, material and substantial" evidence. On this issue, however, we agree with the Court of Appeals:

> The Superior Court's findings and conclusions as to the Board's findings of fact have no basis, as the Board's principal findings of fact are not only supported by competent evidence, they are essentially undisputed. Dr. Guess himself testified that he frequently used homeopathic medicines in treating patients, several qualified North Carolina physicians testified that such use is contrary to the "standards of acceptable and prevailing medical practice" in this state, and no doctor testified otherwise; indeed, so far as the record indicates Dr. Guess is the only physician in North Carolina that administers homeopathic medicines to patients.

In re Guess, 95 N.C. App. 435, 437, 382 S.E.2d 459, 461 (1989).

Findings by the Board of Medical Examiners, if supported by competent evidence, may not be disturbed by a reviewing court. Further, "[j]udicial review of a revocation of license by order of the Board does not authorize the reviewing court to substitute its discretion for that of the Board." *In re Wilkins*, 294 N.C. 528, 545, 242 S.E.2d 829, 830 (1978) (citations omitted), *criticized on other grounds by In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). Dr. Guess argues that the Board must show a specific risk of harm resulting from his homeopathic practices before

it may interfere with them and that, since no such risk was shown, the Board's decision could not be based upon competent evidence. As we have already rejected his underlying premise, his argument here is likewise rejected. The Board's findings leading to its decision were based upon competent, material, and substantial evidence regarding what constitutes "acceptable and prevailing" standards of medical practice in North Carolina. No more was required. Guess' evidence concerning the efficacy of homeopathy and its use outside North Carolina simply was not relevant to the issue before the Board.

Dr. Guess also contends that the Board's decision was arbitrary and capricious and, therefore, must be reversed under N.C.G.S. § 90-14.10. He argues that the Board's arbitrariness is revealed in its "selective" application of the statute against him. He seems to contend that if the Board is to take valid action against him, it must also investigate and sanction every physician who is the "first" to utilize any "new" or "rediscovered" medical procedure. We disagree. The Board properly adhered to its statutory notice and hearing requirements, and its decision was amply supported by uncontroverted competent, material and substantial evidence. We detect no evidence of arbitrariness or capriciousness.

Dr. Guess strenuously argues that many countries and at least three states recognize the legitimacy of homeopathy. While some physicians may value the homeopathic system of practice, it seems that others consider homeopathy an outmoded and ineffective system of practice. This conflict, however interesting, simply is irrelevant here in light of the uncontroverted evidence and the Board's findings and conclusion that homeopathy

is not currently an "acceptable and prevailing" system of medical practice in North Carolina.

While questions as to the efficacy of homeopathy and whether its practice should be allowed in North Carolina may be open to valid debate among members of the medical profession, the courts are not the proper forum for that debate. The legislature may one day choose to recognize the homeopathic system of treatment, or homeopathy may evolve by proper experimentation and research to the point of being recognized by the medical profession as an acceptable and prevailing form of medical practice in our state; such choices, however, are not for the courts to make.

We stress that we do not intend for our opinion in this case to retard the ongoing research and development of the healing arts in any way. The Board argues, and we agree within our admittedly limited scope of medical knowledge, that preventing the practice of homeopathy will not restrict the development and acceptance of new and beneficial medical practices. Instead, the development and acceptance of such new practices simply must be achieved by "acceptable and prevailing" methods of medical research, experimentation, testing, and approval by the appropriate regulatory or professional bodies.

III.

Dr. Guess also argues that N.C.G.S. § 90-14(a)(6) is unconstitutionally vague, because a reasonably intelligent doctor will not know whether he is engaging in unprofessional conduct each time he tries a new or different medical practice not widely used in North Carolina. *See*

In re Wilkins, 294 N.C. 528, 548, 242 S.E.2d 829, 841 (1978), *criticized on other grounds by In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). We have previously held that the predecessor statute to the current N.C.G.S. § 90-14 was neither vague nor overbroad. *Id.* at 546-49, 242 S.E.2d at 839-41. For reasons similar to those expressed in *Wilkins*, we conclude that any reasonably intelligent licensed physician will know when he is engaging in a practice which does not conform to "the standards of acceptable and prevailing medical practice" in North Carolina. Our conclusion is buttressed by the hearing testimony before the Board, where several doctors testified without hesitation that the practice of homeopathy does not conform to the standards of acceptable and prevailing medical practice in North Carolina.

IV.

Dr. Guess next contends that the Board's decision unconstitutionally invades his and his patient's privacy rights, by invading Guess' right to select his method of practice and invading his patients' rights to their choice of treatments. We disagree on both points. Regarding Guess' ability to select his method of practice, "there is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowsley*, 272 U.S. 581, 596, 71 L.Ed. 422, 429 (1926) (citing cases). Further, the Board's decision does not deprive Guess of his privilege to practice medicine, it simply limits his methods of treating patients to those which conform to the acceptable and prevailing standards of medical practice in North Carolina. Regarding Guess' claim that the Board's decision invades his patients' right to select the treatment of

their choice, we initially note that he has no standing to raise his patients' privacy interests in this regard. *See Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (citing cases), *limited on other grounds by Madison Cablevision v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989). Further, we have recognized no fundamental right to receive unorthodox medical treatment, and we decline to do so now. *See State v. Howard*, 78 N.C. App. 262, 269, 337 S.E.2d 598, 603 (1985), *disc. rev. denied, appeal dismissed*, 316 N.C. 198, 341 S.E.2d 581 (1986).

V.

Finally, Dr. Guess contends that by denying him the opportunity to practice homeopathy, the Board is exercising unbridled and unconstitutional monopoly power. We disagree. The Board's authority to regulate the practice of medicine creates no unconstitutional monopoly. *See State v. Call*, 121 N.C. 643, 646, 28 S.E. 517, 517 [sic] (1897); *State v. Howard*, 78 N.C. App. at 266, 337 S.E.2d at 601.

VI.

The order of the Board of Medical Examiners allowed Dr. Guess to continue practicing medicine so long as he refrained from practicing homeopathy and otherwise conformed to the standards of acceptable and prevailing medical practice in North Carolina. The Superior Court erred in reversing and vacating the Board's decision, and the Court of Appeals erred in its decision affirming the Superior Court. The decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals

for its further remand to the Superior Court, Wake County, for proceedings consistent with this opinion.

Reversed and remanded.

Justice FRYE dissenting.

The underlying and essential question in this case is whether the Board may revoke a physician's license to practice medicine for "unprofessional conduct" under N.C.G.S. § 90-14(a)(6) based on a deviation from "the standards of acceptable and prevailing medical practice" without a finding that the deviation carries with it a potential for harm to the physician's patients or to the public. The Court of Appeals held that the Board may not do so. I agree and therefore dissent from the majority's holding to the contrary.

I believe that the majority has construed subsection (6) of N.C.G.S. § 90-14(a) in a manner inconsistent with its purpose and legislative intent. N.C.G.S. § 90-14(a) provides that the Board shall have the power to deny, annul, suspend, or revoke a physician's license to practice medicine in this State for any of some thirteen reasons. In addition to "unprofessional conduct," a license may be revoked for immoral or dishonest conduct; for producing or attempting to produce an abortion contrary to law; for making false statements to the Board; for being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, etc.; for conviction of a crime involving moral turpitude; for making false representations in order to obtain practice, money or anything of value; for advertising or publicly professing to treat human ailments under a system or school of treatment or practice other than that for which the person

has been educated; for mental incompetency; for lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients; for promotion of the sale of drugs, etc., in such a manner as to exploit the patient for financial gain; upon suspension or revocation of a license to practice medicine in another state; or for failure to respond, within a reasonable period of time and in a reasonable manner, to inquiries from the Board concerning any matter affecting the license to practice medicine. Even a cursory review of subsection (6) shows that it is directed to protecting the health and safety of patients and the public. The common thread running through each of these reasons for revocation of a license is the threat or potential for harm to patients and the public.

Subsection (6) of N.C.G.S. § 90-14(a) provides that the Board shall have the power to deny, annul, suspend, or revoke a physician's license for:

> (6) unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice or good morals, whether the same is committed in the course of his practice or otherwise, and whether committed within or without North Carolina[.]

The majority treats the language "irrespective of whether or not a patient is injured thereby" as meaning irrespective of whether there is an injury or threat of injury

caused by the deviation. I do not believe that the legislature so intended. Dr. Guess argues, and I agree, that this language gives the Board authority to act before injury occurs, but does not eliminate the public purpose requirement that the medical practice pose some threat or potential for harm to the public. The phrase "unprofessional conduct" connotes dishonorable or unethical behavior, *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978), and, in the context of the statute, means substandard medical practice that cannot be tolerated because of the risk of harm such treatment poses to the public. Subsection (6), like the remainder of section 90-14(a), was enacted for the purpose of regulating the medical profession to protect the public health and safety and not simply to prevent a doctor from being the first one in the State to use a particular medicine or form of healing.

A careful examination of the evidence presented before the Board shows that Dr. Guess' practice of homeopathy is not unprofessional conduct within the meaning of N.C.G.S. § 90-14(a)(6). All of the evidence tended to show that Dr. Guess is a highly qualified practicing physician who uses homeopathic medicines as a last resort when allopathic medicines are not successful. He takes 150 credits of continuing medical education approved by the American Medical Association every three years and from fifty to eighty hours of homeopathic continuing medical education each year. The homeopathic medications prescribed by him are listed in the Homeopathic Pharmacopoeia of the United States and are regulated by the United States Federal Food, Drug and Cosmetic Act. The homeopathic approach is often preferred, in Dr. Guess' words, "primarily because of its well

documented safety." This is not a case of a quack beguiling the public with snake oil and drums, but a dedicated physician seeking to find new ways to relieve human suffering. The legislature could hardly have intended this practice to be considered "unprofessional conduct" so as to revoke a physician's license in the absence of some evidence of harm or potential harm to the patients or to the public. Nothing in the record before the Board or this Court justifies so broad a sweep in order to secure the public "against the consequences of ignorance and incapacity as well as of deception and fraud." *See Dent v. West Virginia*, 129 U.S. 114, 122, 32 L.Ed. 623, 626 (1889).

I also disagree with the majority's conclusion that Dr. Guess's evidence presented to the Board concerning the efficacy of homeopathy and its use outside North Carolina was not relevant to the issue before the Board. North Carolina does not and should not exist as an island to itself. The evidence that homeopathy is accepted in other states and in other countries of the world and that it has a beneficial rather than harmful effect certainly ought to be of some significance to the Broad and to the citizens of this State concerned about the public health and safety. The majority rejects evidence of the legitimacy of homeopathy in other states and countries throughout the world as being irrelevant because homeopathy is not currently an acceptable and prevailing system of medical practice in North Carolina. This raises the legitimate question of how the acceptable and prevailing practice can be improved in North Carolina if we do not even consider what happens in other states and countries.

Lastly, I disagree with the majority's conclusion that Dr. Guess' remedy lay with the legislature. As I have

stated earlier, N.C.G.S. § 90-14(a) is intended to protect the public from harmful or dangerous practices. In light of this policy, I do not believe that the General Assembly would require a physician to undergo a possibly lengthy wait for legislative action while it is attending to other matters before allowing him to make non-dangerous, beneficial treatments available to members of the public who knowingly consent. Where there is no showing of danger, I do not believe specific legislative approval is a prerequisite to a physician engaging in a practice which is by all indications helpful when used wisely.

I vote to affirm the unanimous decision of the Court of Appeals.

APPENDIX B

IN THE COURT OF APPEALS

IN RE GUESS

[95 N.C. App. 435 (1989)]

IN RE: GEORGE A. GUESS, M.D., RESPONDENT

No. 8710SC618

(Filed 5 September 1989)

ON remand from the North Carolina Supreme Court by a decision reported at 324 N.C. 105, 376 S.E.2d 8 (1989).

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Susan M. Parker, for petitioner appellant.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for respondent appellee.

PHILLIPS, Judge.

This appeal by the North Carolina Board of Medical Examiners is from the judicial review of its decision sanctioning the respondent physician. When it was first here we declined to determine it, *In re Guess*, 89 N.C. App. 711, 367 S.E.2d 11 (1988), because G.S. 90-14.11, still in the books, directs that decisions of the North Carolina Board of Medical Examiners, after being reviewed by the Superior Court, be appealed to the Supreme Court, and because several years after G.S. 7A-27(b) authorized this Court to receive appeals from the judicial review of administrative decisions our Supreme Court in *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978), accepted an

appeal from the Superior Court's review of a decision by the North Carolina Board of Medical Examiners and stated that it had jurisdiction to do so. Our decision was vacated by the Supreme Court, which held that this Court had initial appellate jurisdiction over the appeal because the enactment of G.S. 7A-27(b) in 1967 in effect repealed G.S. 90-14.11, and we herewith determine it as directed.

The pertinent facts are few and essentially undisputed. Following notice and a hearing the Board of Medical Examiners of the State of North Carolina conditionally revoked the license of Dr. George Albert Guess, a specialist in family medicine situated in Asheville, to practice medicine in this state. The action was taken under G.S. 90-14(a), which authorizes the Board to suspend or revoke licenses to practice medicine for several improper activities or practices, one of which is–

> (6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, . . .

Proceeding under this provision the Board charged Dr. Guess with unprofessional conduct in that he customarily treated patients with preparations known generally as "homeopathic medicines," a practice not in accord with the standards of acceptable and prevailing medical practice in this state. From the evidence presented at the hearing the Board found that the charge had been sustained; *viz*, that in treating patients Dr. Guess customarily administered "homeopathic medicines" to his patients and that such administration was contrary to acceptable

and prevailing medical practices in this state. From these findings the Board concluded that Dr. Guess' utilization of homeopathic medicines in his practice was unprofessional conduct under G.S. 90-14(a)(6) and revoked his license to practice, but stayed the revocation upon the condition that he not use homeopathic medicines in his practice and otherwise conform to acceptable and prevailing medical practice in this state. Following Dr. Guess' appeal to the Superior Court the order was vacated upon findings and conclusions that the Board's findings of fact and conclusions of law were not supported by competent evidence and were arbitrary and capricious.

The Superior Court's findings and conclusions as to the Board's findings of fact have no basis, as the Board's principle findings of fact are not only supported by competent evidence, they are essentially undisputed. Dr. Guess himself testified that he frequently used homeopathic medicines in treating patients, several qualified North Carolina physicians testified that such use is contrary to the "standards of acceptable and prevailing medical practice" in this state, and no doctor testified otherwise; indeed, so far as the record indicates Dr. Guess is the only physician in North Carolina that administers homeopathic medicines to patients. Nor is the Board's conclusion of law that such departure from acceptable and prevailing medical practice was unprofessional conduct and a ground for punishment arbitrary and capricious, as the court ruled, for the Board's conclusion is based upon the provisions of G.S. 90-14(a) which explicitly state that "any departure" from the standards of acceptable and prevailing medical practice in this state is

unprofessional conduct and a ground for suspending or revoking a physician's license.

Nevertheless, we believe that the order vacating the Board's order is correct and we affirm it. We do this because the Board neither charged nor found that Dr. Guess' departures from approved and prevailing medical practice either endangered or harmed his patients or the public, and in our opinion the revocation of a physician's license to practice his profession in this state must be based upon conduct that is detrimental to the public; it cannot be based upon conduct that is merely different from that of other practitioners. For the General Assembly created the Board of Medical Examiners to "properly regulate the practice of medicine and surgery" in this state, G.S. 90-2; and since "[t]he State can only regulate for the protection of the public," *State v. McKnight*, 131 N.C. 717, 724, 42 S.E. 580, 582 (1902), its purpose could have only been to protect the public. Thus, implicit in the provisions granting the Board power to revoke a medical license for practices not in conformity with the standards of acceptable and prevailing medical practice in the state is the requirement that the nonconforming practices endanger or harm the public in some way. Without that implicit requirement G.S. 90-14(a)(6) would permit the Board of Medical Examiners to suspend the license of any physician whose methods or practices, though harmless or even beneficial to his patients and the public, differ in some particular from those of most practitioners. Such unqualified power by an administrative agency would be contrary to the public interest, and was not the legislature's to give in any event.

Emphasizing that G.S. 90-14(a)(6) expressly makes it unnecessary to establish that a patient was injured by any unapproved medical practice and makes departures from approved and prevailing medical practice unprofessional conduct and a ground for sanctions, the Board contends that the legislature intended thereby to require it to establish only a departure from accepted and prevailing medical practice before suspending or revoking a physician's license. This argument is rejected. In not making injury to a patient an element of improper medical practice that warrants suspension from the practice the General Assembly only recognized the commonly known fact that not every improper or even irresponsible act of a physician results in injury to a patient; and that it did not go farther and provide that potential harm to the public need not be established is an indication that it understood that innocuous departures from prevailing medical practice cannot be a ground for suspending or revoking a physician's license.

Our holding, therefore, is that: Before a physician's license to practice his profession in this state can be lawfully revoked under G.S. 90-14(a)(6) for practices contrary to acceptable and prevailing medical practice that it must also appear that the deviation complained of posed some threat of harm to either the physician's patients or the public. This decision, of course, is no bar to any future proceeding by the Board against Dr. Guess or any other medical practitioner based upon charges and evidence that practices or conduct contrary to approved and prevailing medical practices in this state have exposed either persons or the public to harm.

Affirmed.

Judges WELLS and PARKER concur.

APPENDIX C

BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE
STATE OF NORTH CAROLINA

In re:	)	
GEORGE ALBERT GUESS, M.D.,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

THIS MATTER coming on for hearing and being heard before the Board of Medical Examiners of the State of North Carolina ("Board") on October 18, 1985 at Asheville, North Carolina and on December 2, 1985 at Raleigh, North Carolina; and the Board, having heard and considered the evidence presented in the form of testimony from Respondent and various witnesses and documentary exhibits; and having heard and considered the arguments of counsel; now makes the following Findings of Fact, Conclusion of Law and Order:

Findings of Fact

1. Respondent was duly licensed to practice medicine in North Carolina on June 13, 1978 and holds license no. 22573.

2. Respondent is specialty-board certified in the practice of family medicine.

3. Respondent conducts his practice in Asheville, North Carolina.

4. In his practice Respondent offers his services to the general public to diagnose or attempt to diagnose,

treat or attempt to treat, and prescribe for or administer to, or profess to treat human ailments, diseases and the like.

5. Respondent, in the course of his diagnosing or attempting to diagnose, treating or attempting to treat, prescribing for or administering to, or professing to treat human ailments, diseases and the like, regularly and customarily administers to his patients certain preparations known generally as "homeopathic medicines."

6. Respondent, in the course of his diagnosing or attempting to diagnose, treating or attempting to treat, prescribing for or administering to, or professing to treat human ailments, diseases and the like, regularly and customarily recommends to and prescribes for ingestion and consumption by his patients certain preparations known generally as "homeopathic medicines."

7. Respondent, in his utilization in his practice of certain preparations known generally as "homeopathic medicines," provides such preparations to, and is the source of supply for, his patients since such preparations are not generally available through retail pharmacies or other sources of medicinal supplies usually available to the general public.

8. Respondent's patients use, ingest and consume these preparations generally known as "homeopathic medicines" which Respondent administers, recommends and prescribes to and for them.

9. Respondent is the only licensee of the Board known to the Board who utilizes, in the course of diagnosing or attempting to diagnose, treating or attempting

to treat, prescribing for or administering to, or professing to treat human ailments, diseases and the like, certain preparations known generally as "homeopathic medicines."

10. N.C.G.S. §90-14(a)(6) provides that the Board has the power to "deny, annul, suspend, or revoke" a license to practice medicine issued by the Board for any of various reasons, including "[u]nprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice . . . irrespective of whether or not a patient is injured thereby."

11. For any of the 13 enumerated reasons set forth in N.C.G.S. §90-14(a), the Board may revoke a license, and "may limit the accused physician's practice of medicine with respect to the extent, nature or location of his practice as the Board deems advisable."

12. While a few other states have statutory schemes for the regulation of the practice of so-called "homeopathic medicine," no such statutory procedures exist in North Carolina.

13. The utilization by Respondent in his practice of medicine of certain preparations known generally as "homeopathic medicines" departs from and does not conform to the standards of acceptable and prevailing medical practice in this State.

Conclusions of Law

1. Respondent is engaging in the practice of medicine within the meaning of N.C.G.S. §90-18.

2. The utilization by Respondent in his practice of medicine of certain preparations known generally as "homeopathic medicines" constitutes unprofessional conduct within the meaning of N.C.G.S. §90-14(a)(6).

Order

1. License no. 22573 issued by the Board to Respondent is revoked effective five (5) days from the date upon which these Findings of Fact, Conclusions of Law and Order are signed by the Board.

2. The revocation of Respondent's license is stayed for a temporary period of three (3) years, after which such stay of revocation shall become permanent, provided that:

a. Respondent refrains from the use in his practice of medicine of certain preparations known generally as "homeopathic medicines"; and

b. Respondent conducts his practice of medicine in accordance with the standards of acceptable and prevailing medical practice in North Carolina; and

c. Respondent continues to be of high moral character; and

d. Respondent violates no state or federal laws.

SO ORDERED.

This the 14th day of January, 1986.

BOARD OF MEDICAL EXAMINERS
OF THE STATE OF NORTH
CAROLINA

By: /s/ Jack A. Koontz, M.D.
Jack A. Koontz, M.D.
President

ATTEST:

/s/ Bryant D. Paris, Jr.
Bryant D. Paris, Jr.
Executive Secretary

MEW:mbp/3-I